Transnational State-Liability Law? Kundus on Trial

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Andreas Fischer-Lescano Do 24 Okt 2013

Next week the Bonn regional court will begin hearing evidence in the suit brought by victims of the Kundus attack, who are seeking compensation for damages. Just a few weeks ago Germany's Federal Constitutional Court published its chamber decision regarding the constitutional complaint entered by victims of the bombing of the Varvarin bridge in the Kosovo War. The First Chamber of the Second Senate did not itself field the constitutional complaint, but it did make certain critical suggestions as to the contours of a transnational state-liability law. The Bonn regional-court decision will show how the civil courts will assimilate this.

Evidentiary Hearing: Photos and Audiotapes

It has now been four years since the Bundeswehr was involved in the Kundus attack in which two 500-pound bombs were dropped on a fuel tanker that had been abducted by the Taliban. This deployment, ordered by Colonel Klein on 4 September 2009, caused the deaths of more than a hundred people. Ever since then German justice has grappled with the Kundus bombing raid. While the Federal Public Prosecutor discontinued its inquiry in 2010 and the subsequent constitutional complaint has still not been ruled upon by the Federal Constitutional Court, in the meantime there has been action afoot in the civil courts. A first hearing of evidence will take place before the Bonn regional court on 30 October 2013.

Already in March 2013 the regional court addressed the Kundus attack and the objections of the Federal Government. It concluded that German legal jurisdiction did not extend to this matter, that the Federal Republic of Germany is incapable of being sued, that in any event there can be no application of public-liability law in armed conflict and that no norms with respect to third-party protections can be violated.

In an indicative court order from April 2013, the regional court overruled these arguments: (1) German legal jurisdiction did extend to this matter. (2) The Federal Republic's ability to be sued is not undercut by the fact that the deed in question was in the context of a NATO deployment, for involvement in the NATO chain of command does not make a certain entity immune to liability. (3) The applicability of public-liability law and individual claims is not precluded by the fact that in Afghanistan an internationalized but non-international armed conflict is taking place. (4) In terms of the official duties entailed in non-violation of third-party protections, the provisions of the Geneva Convention and the supplementary protocols I and II are of relevance, in particular article 13 of supplementary protocol I as well as articles 51 and 57 of supplementary protocol II, for these were conceived to protect the civilian population.

The logical consequence of this was that in taking evidence from the defendants, the court waived submission of all the photos made by fighter pilots the night of the deployment and which had been brought to Colonel Klein's attention. The same held for the audiotapes of conversations taking place during the night in question between fighter pilots and the forward air controller of the Provincial Reconstruction Team regarding the armed deployment.

Meticulous Review

The Bonn regional court apparently wants to reconstruct the circumstances surrounding Colonel Klein's military decision and submit it to a legal test. It should feel confirmed in its process line through the Varvarin resolution of the Constitutional Court. The Constitutional Court did not take on the constitutional complaint, and it also left open the central question as to whether public-liability law is applicable in armed conflict; but at the same time it issued some weighty comments with respect to judicial review of military decisions, the legal implication being that there is a case to be made for any action that might seek damages.

The Constitutional Court criticized the specialized courts for granting the Federal Government, in its choice of military targets, discretionary margins that were not judicially testable. The awarding of a non-justiciable discretionary margin to the Federal Government cannot be justified from the standpoint of constitutional law:

> *"The drawing up of target lists . . . are not political decisions that are a priori exempt from judicial control . . . . It is also not evident that the administration of justice should come up against its functional limits in clarifying this legal question. The international regulations at issue here do implement indeterminate legal concepts in describing what can be considered a legitimate military objective; but legally and effectively their interpretation and application is absolutely testable through the use of certain objective criteria."*

As the specialized courts essentially based their arguments on the discretionary power of the Federal Government in the spheres of foreign and defense policy, they proceeded from a criterion of scrutiny that is constitutionally untenable (BVerfG, a.a.O., Rdn. 55).

Moreover, the Constitutional Court corrected the framework pertaining to the distribution of the burden of proof that the civil courts applied. It is unconstitutional that an objective modification of and restriction on the burden of proof, which might possibly lead to a reversal of that burden of proof, should not be taken into account. This is namely permissible in those cases where according to the military's causal reasoning "a person has been aggrieved through breach of official duty in which he stands outside the course of events, as described by him, and therefore has and can have no access to the internal affairs of the administration." (BVerfG, a.a.O., Rdn. 64)

It is in this way that the Constitutional Court has prestructured how it imagines future military decision should be worked up constitutionally. This will also impact further developments in the trials addressing the Kundus bombing. The Federal Government will not be able to fall back on the argument that Colonel Klein has the prerogative to evaluate matters from a military perspective. The burden of proof will be on it to show that the obligation to exercise due diligence was not neglected in the deployment. This is no small hurdle, particularly as there are intimations that the requirements of due diligence, as laid down in the Rules of Engagement, were neglected, this being made clear in the German Bundestag's inquiry report into the Kundus episode (BT-Drs. 17/7400, pp. 145 ff.).

The Scope of Liability Abroad

All the same, the Varvarin decision only lightly touched upon fundamental questions of transnational state liability abroad. This pertains to the how and why of genuine individual claims at the international level, the systematic integration of decisions of the European Court of Human Rights into German state-liability law, and in dealing with obligations pertaining to constitutional and international protections.

The Constitutional Court issued a clear no in its review of the question as to whether or not there was any right to individual-compensation claims from the perspective of customary international law. But the chamber did not embed its apodictic statement in the network of international decisions and, for instance, failed to grapple with the assessments of the International Court of Justice with regard to the Israelis' building of the wall, which recognized that in armed conflict the state that is liable has an international obligation "to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage" (IGH, Construction of a Wall, Rdn. 153). Also omitted was any opinion regarding the "basic principles and guidelines with respect to the rights of victims of any gross violations of international human-rights norms and grave breaches of international humanitarian law with respect to legal protection and compensation" with which the UN General Assembly systematized the status of international-compensation law in 2006 (UN GA, A/RES/60/147). In other words, not only did the Constitutional Court not come to grips with the varying opinions but it blatantly ignored them.

This was also the case with the European Court of Human Rights, which in the Al Skeini verdict deduced comprehensive obligations with respect to liability and in the Isayeva verdict detailed investigative duties – which went unheeded in the case of the Kundus deployment – for deployments within the framework of armed conflict. All of this goes unmentioned in the non-acceptance decision, so the duty of consideration – which the Constitutional Court itself had developed for the decisions of international judicial entities in Görgülü and LaGrand/Avena – in turn goes unapplied in a field that has few peers in its push for the development of transnational standards.

Also irritating is how acquiescent the Constitutional Court was in accepting the plea of the defendants in the Varvarin case – that the Federal Government had no indications as to who might have been the responsible party or parties in the mistakes committed in the bombing of the bridge due to NATO's "'need-to-know-rule,' according to which it is military practice in all NATO operations that only those armed forces who are directly involved in a certain operation are privy to information necessary for the deployment" (BVerfG, a.a.O., Rdn. 66). The Varvarin decision unquestioningly accepts the Federal Government's assertion that they only have information pertaining to their own role in the air strike and that they can neither know nor *must* they know which of their allies is to be saddled with responsibility for the mistake committed in this military operation. This is tantamount to an invitation on the part of Germany's supreme court to exculpate Vogel-Strauss. This can hardly be harmonized with the protection of fundamental rights nor with the international responsibility to protect as enshrined in the declaration of the UN-General Assembly on occasion of the 2005 World Summit.

Responsibility of the Specialized Courts

Unfortunately the Federal Constitutional Court, in its Varvarin decision, missed a chance to nail down precisely what should be the framework of transnational state-liability law. So it is now up to the specialized courts to assert that there are constitutional limits to what the Bundeswehr can do even in deployments abroad. And the Bonn regional court is now granted the opportunity to write legal history by being the first ever civil court of the Federal Republic of Germany to allow the claims of victims of German military power abroad.

Translation: Kevin McAleer

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